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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN & MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners
* Counsel of Record

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit erred in holding that terrorism, torture, hostage-taking and summary execution do not violate the "law of nations" within the meaning of the Alien Tort Claims Act, 28 U.S.C. § 1350, thereby conflicting with the Second Circuit's decision, construing section 1350, that torture does violate the "law of nations" and further conflicting with the requirement of this Court and the Second Circuit that international law be defined by the "general assent of civilized nations."

2. Whether the Alien Tort Claims Act, 28 U.S.C. § 1350, fails to provide a cause of action for injuries suffered as a result of tortious actions in violation of the "law of nations" but requires aliens to identify an explicit grant of a cause of action separate and apart from the statute itself, an interpretation which conflicts with that of the Second Circuit and which would nullify the "law of nations" portion of the statute.

3. Whether a suit seeking damages under 28 U.S.C. §§ 1331 and 1350 for injuries suffered as a result of state-sponsored acts of terrorism, torture, hostage-taking and summary execution is necessarily nonjusticiable because of the political question doctrine, a conclusion which conflicts with prior decisions of this Court and the Second Circuit.

4. Whether the District of Columbia Circuit erred in holding that petitioners who are United States citizens do not have causes of action arising under "treaties of the United States" within the meaning of 28 U.S.C. § 1331 for injuries suffered as a result of state-sponsored acts of terrorism, torture, hostage-taking and summary execution, thereby conflicting with prior decisions of this Court and the Ninth Circuit.

PARTIES

The caption does not reflect the names of the following petitioners: Sharona Tel-Oren; Adiel Tel-Oren; Reviva Tel-Oren; Nir Tel-Oren; Joseph Hochman, individually and in his representative capacity; Monique Enekave, individually and in her representative capacity; Tal Enekave; Anat Enekave; Adina Haloune, individually and in her representative capacity; Tamar Elefand, individually and in her representative capacity; Ronit Elefand; Maya Susinsky Schur, individually and in her representative capacity; Eliezer Kroytatro; Issac Amir; Ettel Sacherbrot; Isaac Mishkal, individually and in his representative capacity; Rachel Mishkal; Ruth Mishkal; Joseph Hadany, individually and in his representative capacity; Levana Hadany; Ayelet Hadany; Simacha Gal-On, individually and in his representative capacity; Shoshana Gal-On; Idan Gal-On; Lily Glottman, individually and in her representative capacity; Anat Glottman; Ilan Glottman; Carmela Rosner, individually and in her representative capacity; Mordechai Shefer; Tova Aharonovits, individually and in her representative capacity; Gideon Haas; Miriam Haas; Michelle Haas; Tal Haas; Schlomo Zait, individually and in his representative capacity; Ruth Drory, individually and in her representative capacity; Michael Drory; Ayelet Drory; Albert Ashkenazi, individually and in his representative capacity; Yechiel Leibovici, in his representative capacity; Manashe Malca; Eve Malca; Abraham Shamir; Iris Shamir; Ayelet Shamir; Esther Menashrov, in her representative capacity; Jacob Besterman, in his representative capacity; Simon Segev, in his representative capacity; Judith Eshet, in her representative capacity; Isaac Vachs; Nessa Schwarz; Joseph Savechnik; Ella Savechnik; Abraham Perets; Judith Zait; Gabriel Zait; Yfaat Zait; Alexander Jaacobi; Ella Jaacobi; Oded Jaacobi; Uzy Aviasaf; Bruria Aviasaf;

Michelle Aviasaf; Esther Aviasaf; Bilhah Sela; Alegra Cohen, in her representative capacity; and Joseph Polak, individually and in his representative capacity.

The caption does not reflect the names of the following respondents: National Association of Arab Americans, Palestine Liberation Organization and Palestine Information Office.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Hanoch Tel-Oren, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 3, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 726 F.2d 774 and appears in the Appendix at 1a to 114a. The opinion of the United States District Court for the District of Columbia is officially reported at 517 F. Supp. 542 and appears in the Appendix at 115a to 130a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1984. Petition for rehearing and suggestion for rehearing *en banc* were denied on March 19, 1984. This petition is filed within ninety (90) days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1331, Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Section 1350, Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

A. Material Facts

Petitioners are a group of American, Israeli and Dutch citizens who were themselves injured and/or sue as representatives of persons murdered in a terrorist attack in Israel on March 11, 1978. In that attack, thirteen heavily-armed members of the Palestine Liberation Organization ("PLO"), acting under the direction of, and in conspiracy with, the Libyan Arab Republic ("Libya"), landed by boat near the civilian Haifa-Tel Aviv Highway with the intention of taking civilians hostage in order to extort the release of certain PLO terrorists in Israeli jails. In accordance with their instructions, the terrorists began this despicable enterprise with the express intent to kill their hostages if the PLO prisoners were not released from jail.

The events of March 11, 1978 constitute a tale of horror, indiscriminate violence and cold-blooded murder.

Upon landing on the beach in Israel, the Libyan-trained and -financed terrorists, without provocation, first shot to death an American photographer. Moving to the highway, they then attacked and commandeered an unarmed civilian bus carrying families of Egged Bus Company cooperative members returning from a company outing. The terrorists immediately killed some adults and children and took the remaining passengers hostage. Some of the terrorists then captured an unarmed civilian taxicab, fired at its passengers and took them hostage. Shooting at passing automobiles, they killed some passengers and wounded others in their limbs, chests and heads. Children were eyewitnesses to the shooting, torture and murder of their parents. Fathers sat helplessly as the terrorists physically and mentally abused their wives and children.

The terrorists then ordered the bus and taxicab drivers to travel toward Tel Aviv. Some of the terrorists sat on the roof of the cab and shot at passing cars, killing and maiming more unarmed civilians. One of the cars contained seven members of the Tel-Oren family, citizens of the United States; Hanoch Tel-Oren's fifteen year-old son was shot to death as his parents and siblings watched in horror.

Eventually, the terrorists shot at and stopped a second unarmed civilian bus, took its passengers hostage and forced them onto the first bus. On board the bus, the terrorists tied all the men to their seats, and beat, humiliated and tortured numerous hostages, including women and children. Captive parents were forced to watch their children abused and brutalized; youngsters saw their siblings murdered and disfigured. Meanwhile, some terrorists threw hand grenades supplied by Libya at passing cars.

Learning of these events, the civilian police set up a roadblock. The bus crashed through the roadblock, but was finally brought to a halt by the police. Unable to escape, the terrorists forced an adult male, Chaviv

Enekave, to leave the bus, apparently to deliver a negotiation message to the police officers. Just as Enekave left the bus, however, the terrorists shot him in the back of the head, killing him instantly. Two of Enekave's children, witnessing their father's cold-blooded murder, jumped up in anguish, and the terrorists immediately shot and killed them. Two of Enekave's other children, immobilized by terror and shock, witnessed all three of these summary executions.

Although the bus had been stopped, the terrorists continued to fire at the hostages within the bus and soon began to throw grenades at those hostages in the back of the bus. The shrapnel from the grenades sprayed in every direction, wounding numerous hostages. Using a little girl as a shield, the terrorists departed the bus, leaving behind heavy explosives purchased and supplied by Libya. They then threw additional hand grenades into the bus, igniting the explosives and setting the bus afire. Hostages tied to their seats were engulfed by the flames and burned to death. Others, immobilized by flying shrapnel, were also burned to death. Passengers who were able to extricate themselves watched as their family members died in the smoldering bus. The bus then exploded, killing more men, women and children.

By the time the incident was over, twenty-two adults and twelve children, including an American citizen, had been killed, and seventy-three adults and fourteen children were seriously wounded. The survivors sustained serious and permanent physical injuries, including the loss of limbs and ears, paralysis, burns to all parts of their bodies and incapacitating internal injuries, such as blood clots and hearing losses. All of the survivors suffer from permanent mental, emotional and psychological injuries, having witnessed the torture, abuse, humiliation and execution of family members and friends, and having themselves been subjected to this barbaric treatment.

On March 10, 1981, petitioners filed suit in the United States District Court for the District of Columbia.[1] Invoking jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1332 (diversity jurisdiction), 28 U.S.C. § 1350 (the Alien Tort Claims Act) and 28 U.S.C. §§ 1330, 1602-1611 (the Foreign Sovereign Immunities Act of 1976), petitioners sought compensatory and punitive damages. They alleged causes of action for tortious acts in violation of the law of nations, treaties of the United States and laws of the United States; for the intentional torts of assault, battery, false imprisonment, infliction of mental distress and infliction of cruel, inhuman and degrading treatment; and for conspiracy to commit torts in violation of the law of nations, treaties of the United States and laws of the United States.

Among petitioners' allegations was the claim that "the PLO and the thirteen terrorists were acting as agents of and were acting within the scope of their employment with Libya." Complaint at 19, ¶ 59. More specifically, petitioners asserted that Libya planned this terrorist operation; raised funds to support the operation; trained the thirteen terrorists for this specific attack; provided the PLO with the arms, boats, hand grenades and other equipment used in this terrorist operation; and gave a hero's welcome to the mother ship which had brought the terrorists to the shore of Israel. *Id.* Petitioners also alleged that Libya, subsequent to the terrorist operation, ratified and claimed responsibility for the attack. *Id.*

B. The District Court's Decision

On June 30, 1981, Judge Joyce Hens Green granted respondents' motion to dismiss petitioners' Complaint.

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[1] Initially, two complaints were filed. The first named as plaintiffs the personal representatives of twenty-nine persons murdered in the attack; the second named sixty-five of the persons wounded in the attack. The complaints were consolidated on June 30, 1981, when the District Court ruled on respondents' motion to dismiss.

Judge Green held that section 1350 is merely jurisdictional and does not itself provide a cause of action. App. B at 125a-126a. She also held that section 1331 did not provide subject matter jurisdiction over the claims of the petitioners who are United States citizens. App. B at 117a-122a.[2]

C. The Court of Appeals' Decision

On appeal, a three-judge panel of the District of Columbia Circuit affirmed the dismissal of petitioners' Complaint, upholding the District Court's denial of jurisdiction over the claims of the aliens and the United States citizens. Two members agreed that the Circuit Courts of Appeals were now divided on the "broad and novel questions" presented by this case, and that review and clarification by this Court was necessary. App. A at 4a (Edwards, J., concurring); App. A at 104a (Bork, J., concurring). Indeed, Judge Edwards, recognizing the importance of the panel's decision, emphasized that "[t]his case deals with an area of the law that cries out for clarification by the Supreme Court." App. A at 4a (Edwards, J., concurring).

Although the panel issued a *per curiam* opinion, Judges Edwards, Bork and Robb filed separate concurring opinions totaling one hundred-fifteen (115) pages. While the court unanimously held that both the American and alien petitioners should not be afforded a right of redress, the panel members set forth startling and often dramatically different views on the questions of whether terrorism,

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[2] Judge Green also stated that petitioners' claims were barred by the local one-year statute of limitations for certain torts. D.C. Code Ann. § 12-301(4). App. B at 127a-129a. The Court of Appeals did not reach this issue. App. A at 53a n.2 (Bork, J., concurring). In light of the unambiguous language of D.C. Code Ann. §§ 12-301(8) and 12-302, and controlling precedent in the District of Columbia Circuit, however, Judge Green clearly erred. *See, e.g., Richards v. Mileski*, 662 F.2d 65, 68 and n.5 (D.C. Cir. 1981); *Fitzgerald v. Seamans*, 553 F.2d 220, 223 and n.3 (D.C. Cir. 1977); *Canterbury v. Spence*, 464 F.2d 772, 793 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

torture, hostage-taking and summary execution constitute "law of nations" violations within the meaning of the Alien Tort Claims Act, the existence of a cause of action under the statute, the justiciability of this case and the availability of a cause of action under section 1331 for the American citizens murdered and injured in the attack. Judge Edwards held that section 1350 itself provides an express right to sue for violations of the law of nations. Ignoring petitioners' allegations that the PLO acted as an agent of and in conspiracy with Libya, however, he would affirm dismissal on the ground that the PLO is a non-state actor and, therefore, not subject to the dictates of international law. He also stated that the terrorists' actions did not violate the law of nations. Judge Bork agreed that these acts did not violate the law of nations, and further reasoned that the Complaint should be dismissed because it failed to identify an express right to sue separate and apart from section 1350. Judge Robb, abstaining from any discussion of section 1350 and the law of nations, opined that this case is made nonjusticiable by the political question doctrine.

1. *Terrorism, Torture, Hostage-Taking and Summary Execution as "Law of Nations" Violations*

Both Judges Edwards and Bork held that the acts of the Libyan-supported terrorists do not constitute violations of the "law of nations." In reaching their conclusions, Judges Edwards and Bork required unanimity of international opinion as a prerequisite to a finding that terrorism violates the law of nations. Judge Bork stated that there is "less than universal consensus" about "terrorism generally" and about "PLO-sponsored attacks on Israel . . . in particular." App. A at 71a (Bork, J., concurring). He argued that the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), relied upon below by petitioners as evidence of an inter-

national proscription of terrorism, "was said by at least one state at the time of its promulgation not to be applicable to Palestinian terrorist raids into Israel supported by Arab states. 24 U.N. GAOR 297, U.N. Doc. A/C.6/SR 1160 (1969) (remarks of Mr. El Attrash of Syria). . . ." *Id.* According to Judge Bork, this qualification on the Declaration, as well as the fact that "accusations of terrorism are often met not by denial of the fact of responsibility but by a justification for the challenged actions," *id.*, indicated a "lack of consensus" about terroism. *Id.* Judge Edwards also found that "[w]hile this nation unequivocally condemns all terrorist attacks . . . [such] sentiment is not universal." App. A at 46a (Edwards, J., concurring).

Judge Bork made one additional finding regarding the content of the law of nations. He apparently would confine that law to the three offenses that, he contended, were recognized by Blackstone and, therefore, contemplated by the drafters of section 1350 in 1789: piracy, violation of safe conducts and infringement of the rights of ambassadors. App. A at 84a-89a.

2. *The Availability of a Cause of Action Under Section 1350*

Relying on *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and the language of section 1350, Judge Edwards held that the statute itself provides an express right to sue for violations of the law of nations. App. A at 8a-14a (Edwards, J., concurring). Judge Bork, in contrast, rejected the interpretation of section 1350 adopted by Judge Edwards and the Second Circuit in *Filartiga*. He stated that "it is essential that there be an explicit grant of a cause of action" in either the law of nations or a treaty in order to establish jurisdiction under section 1350. App. A at 58a (Bork, J., concurring). Judge Bork then analyzed international law and found that it did not provide petitioners with a cause of action. App. A at 90a-96a.

While Judge Edwards concluded that section 1350, by its express terms, provides a cause of action, he would affirm dismissal on the ground that the PLO "is not a recognized state," App. A at 37a (Edwards, J., concurring), and, therefore, not subject to the dictates of international law. He sought to distinguish *Filartiga* on the ground that petitioners "do not allege facts to show that official or state-initiated torture is implicated in this action." App. A at 38a. The PLO, according to Judge Edwards, "does not act under color of any recognized state's law." App. A at 37a. In reaching this conclusion, however, Judge Edwards failed to consider petitioners' allegations that the PLO acted under color of Libyan authority and as an agent of that state. He also ignored petitioners' elaborate allegations of direct Libyan involvement in the attack.

3. *The Justiciability of this Case*

The political question doctrine, while never having been briefed or argued at the District Court or on appeal, was relied upon exclusively by Judge Robb to preclude adjudication of this case. He was concerned, in particular, that adjudication of this case will "embarrass[] . . . the nation," App. A at 111a-112a (Robb, J., concurring), and "dignify the violence of terrorist atrocities . . . ." App. A at 160a. Judge Bork, while admitting that "the contours of the doctrine are murky and unsettled," App. A at 63a n.8 (Bork, J., concurring), nevertheless adopted it and other considerations of justiciability as an underlying theme of his opinion. *See, e.g.*, App. A at 58a-72a, 103a. Both he and Judge Robb were concerned with the purported "inherent inability of federal courts," App. A at 105a (Robb, J., concurring), to hear cases such as that presented here.

Judge Edwards, in contrast, took strong objection to his colleagues' reliance on "facile labels of abstention or nonjusticiability, such as the 'political question doctrine,'" App. A at 48a (Edwards, J., concurring), and emphasized that "[n]onjusticiability based upon 'political

question' is *at best a limited* doctrine, and it is wholly inapposite to this case." App. A at 48a (emphasis in original). He warned that the doctrine "does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases." App. A at 52a.

4. *The Availability of a Cause of Action for the United States Citizens*

Judge Edwards expressly held that the Tel-Orens, citizens of the United States, had failed to establish jurisdiction under section 1331. He stated that the American citizens had not identified a remedy granted by the law of nations or by any treaties, and he declined to imply a right of action. App. A at 12a-13a n.4 (Edwards, J., concurring). Judge Bork, while not specifically setting forth his reasons, also found that there was no jurisdiction over the claims of the United States citizens. App. A at 54a (Bork, J., concurring).

D. The Filartiga Decision

The opinion of the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), constitutes a fundamental part of the lower court's decision in this case. In *Filartiga*, a father and daughter, both Paraguayan citizens, alleged in a suit brought under section 1350 that a former Paraguayan official had tortured his son, her brother, in violation of the prohibition against torture in international law. The Second Circuit recognized that customary international law is an evolutionary concept, derived from the usage of nations, judicial opinions and the works of jurists. Reviewing the United Nations Charter, various declarations of the United Nations and numerous other international charters and accords, the Second Circuit held that international law had evolved in a manner that now clearly prohibited torture. *Id.* at 880-85. In reaching this conclusion, the Second Circuit looked to the "general assent of civilized nations," *id.* at 881, and did not

require unanimity of international opinion. Having found that torture violated the law of nations, the Second Circuit concluded that the elements of section 1350 had been satisfied; it imposed no requirement that plaintiffs establish a right to sue separate and apart from the statute itself. Nor did the court deem it necessary to discuss whether adjudication was precluded by the political question doctrine.[3]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER ALIENS ARE TO BE DENIED REDRESS UNDER THE LAWS OF THE UNITED STATES FOR INJURIES SUFFERED AS A RESULT OF STATE-SPONSORED TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION, AND TO RESOLVE THE CONFLICT BETWEEN THE DISTRICT OF COLUMBIA AND SECOND CIRCUITS ON THIS ISSUE

The decision below of the District of Columbia Circuit extinguishes the right of redress for persons who have been subjected to tortious actions in violation of the law of nations. This right of redress has been incorporated into, and recognized by, the law of the United States since 1789. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789). Having thus eliminated an important right of redress specifically guaranteed by Congress nearly two hundred years ago, the District of Columbia Circuit's decision, as two panel members expressly recognized, demands review by this Court.

The only provision in United States law granting such a right of redress to aliens is section 1350. The right of

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[3] In *Filartiga*, the Second Circuit reversed the District Court's dismissal of plaintiffs' complaint. On remand, the District Court held that "an award of punitive damages of no less than $5,000,000 to each plaintiff is appropriate to reflect adherence to the world community's proscription of torture and to attempt to deter its practice." *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

redress granted by section 1350 has historically been available to victims of those acts properly classified as "*hostis humani generis.*" *Filartiga*, 630 F.2d at 890. Such acts have been considered so heinous and flagrant as to require their universal condemnation and adjudication. By 1789, when section 1350 was enacted, the common law had long declared the acts of piracy and slave-trading to be *hostis humani generis.* Terrorism, torture, hostage-taking and summary execution are modern equivalents of these acts. Like the acts of piracy and slave-trading, terrorism, torture, hostage-taking and summary execution are among the handful of acts that make the perpetrator "*hostis humani generis*, an enemy of all mankind." *Id.*[4]

The lower court eliminated the longstanding right of redress for such *hostis humani generis* acts in two distinct ways. First, Judge Bork held that the Alien Tort Claims Act fails to provide a cause of action but rather requires aliens to identify an explicit grant of a cause of action separate and apart from the statute itself. Since all such causes of action are provided by municipal law and not by the law of nations, this requirement negates any right of redress. Second, the court required unanimity of international opinion as a prerequisite to a finding that any act of a nation-state or its agent is in violation

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[4] The limited number of acts encompassed by the doctrine of *hostis humani generis* is demonstrated by the relative paucity of suits in which plaintiffs have litigated successfully under section 1350. The acts at issue in the following cases were held to be not so heinous and flagrant as to entitle plaintiff to redress: *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (airline crashes do not violate the law of nations); *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (court noted that "the Eighth Commandment 'Thou shalt not steal' is [not] part of the law of nations"); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960) (law of nations does not confer upon vessels of all nations an unrestricted right of access to harbors); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292 (E.D. Pa. 1963) (unseaworthiness not a violation of international law).

of international law. This likewise eradicates a right of redress, since at least one state, the perpetrator, will condone the acts committed against the victims.

A further consequence of the decision is to exempt terrorism and the included acts of torture, hostage-taking and summary execution from classification as law of nations violations. The lower court's decision thus undermines the attempt by civilized nations to deter and prevent acts of terrorism, torture, hostage-taking and summary execution. Such an outcome is particularly troubling in light of the ever-increasing sponsorship of, and reliance upon, these acts throughout the world.

The lower court's decision, finally, conflicts with prior decisions of this Court and with *Filartiga*. The Second Circuit did not require plaintiffs to identify a right to sue separate and apart from section 1350 itself and, further contrasting with the decision below, it specifically found that torture violates the law of nations. This Court, moreover, as well as the Second Circuit, has required only that a "general assent among civilized nations" exist, and not unanimity of international opinion, in order to invoke international law.

A. Requiring Identification of a Right to Sue Separate and Apart from Section 1350 Nullifies the "Law of Nations" Portion of the Statute, Eliminates it as a Means of Redress and is Contrary to the Express and Unambiguous Language of the Statute

The construction of section 1350 proffered by Judge Bork, requiring identification of a separate right to sue, voids a significant portion of the statute. While he requires that an alien suing under section 1350 demonstrate an express right of action provided by the law of nations, Judge Bork himself concedes that "as a general rule, international law *does not provide* a private right of action. . . ." App. A at 91a (Bork, J., concurring) (emphasis added). Because the law of nations relegates to the states the decision whether to grant causes of action,

see, e.g., Henkin, *Foreign Affairs and the Constitution* 224 (1972), no plaintiff suing under section 1350 will ever be able to demonstrate a right to sue granted by international law.[5] Thus, as aptly summarized by Judge Edwards, "to require international accord on a right to sue . . . would be to effectively nullify the 'law of nations' portion of section 1350." App. A at 10a (Edwards, J., concurring).[6]

The language of section 1350 is unambiguous. Section 1350 grants jurisdiction over civil actions by an alien "for a tort only, committed in violation of the law of nations. . . ." It nowhere requires proof of a separate grant of a cause of action in order to establish a right of redress. Judge Bork's construction of the statute, as Judge Edwards pointed out, is "directly at odds with the language of the statute," App. A at 11a (Edwards, J., concurring), which "only mandates a 'violation of the law of nations' in order to create a cause of action." App. A at 12a. The "violation" itself thus creates a cause of action under section 1350.[7]

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[5] Indeed, even the three offenses which Judge Bork contends were recognized by the drafters of section 1350—piracy, violation of safe conducts and infringement of the rights of ambassadors—would not be actionable under his theory since, as Blackstone himself made clear, "it was the municipal laws of England, not the law of nations, that made the cited crimes offenses. . . ." App. A at 11a (Edwards, J., concurring), citing 4 *Blackstone's Commentaries* 67 (Welsby ed. 1854).

[6] Judge Bork's construction of section 1350 thus raises substantial separation of powers concerns. As pointed out by Judge Edwards, to sustain such a construction "is not only to insult Congress, but inappropriately to place judicial power substantially above that of the legislature." App. A at 35a (Edwards, J., concurring).

[7] That section 1350 itself provides a right to sue is further evidenced by a 1907 opinion of the United States Attorney General. The question posed in the opinion was whether any remedies were available to Mexican citizens harmed by the actions of an American irrigation company along the Rio Grande River. The Attorney General stated:

This construction of section 1350 is supported by the contrast between that statute and section 1331. Section 1331 requires that an action "arise under the Constitution, laws or treaties of the United States." This "arising under" language means that the source of plaintiff's right to sue is not section 1331 itself, but some other law, treaty or constitutional provision. Since section 1350 does not contain any similar "arising under" language, it does not require identification of a separate right to sue. This distinction is particularly significant since Congress revisited section 1350 in 1948. Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934. At that time, the term "arising under" had been a well-established element of federal jurisdiction for more than seventy years. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. As Judge Edwards pointed out, therefore, Congress was fully cognizant that it could draft section 1350 with "arising under" language or with other language requiring a separate "cause

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> As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes *provide a right of action and a forum.* Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction 'of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States.' . . .
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> *I repeat that the statutes thus provide a forum and a right of action.* I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.

26 Op. Att'y Gen. 250, 252-53 (1907) (emphasis added).

The Departments of Justice and State reaffirmed this interpretation of section 1350 in their *amicus curiae* brief filed in *Filartiga* upon invitation by the Second Circuit. The government not only stated that torture violates the law of nations, but also that it gives rise to a private cause of action under section 1350. Brief for the United States, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), App. C at 147a-150a.

of action" or "right to sue." App. A at 12a (Edwards, J., concurring). Congress, however, chose not to do so.

Judge Bork's interpretation of section 1350 is directly at odds with that of the Second Circuit in *Filartiga*. There, once the court determined that torture violated the law of nations, it found the jurisdictional elements of section 1350 to be satisfied. At no point in its analysis did the court require plaintiffs to identify a specific right to sue under the law of nations. Indeed, significant in *Filartiga* is the noticeable absence of any discussion of the question whether section 1350 granted a right of action.[8]

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[8] The construction of section 1350 adopted by the Second Circuit is supported by the Sixth Circuit's decision in *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978). There, the grandmother of four children mistakenly evacuated in "Operation Babylift" from South Vietnam brought suit to have her grandchildren returned to her custody. The Sixth Circuit first rejected section 1331 as a basis for jurisdiction because it found that the treaties invoked by plaintiff did "not create a private right of action for aliens in the federal courts." *Id.* at 629. It then considered the applicability of section 1350. Rather than using Judge Bork's approach of searching for a private right of action under international law, as it had done under section 1331, the Sixth Circuit assumed that defendant's actions constituted a " 'tort only' within the meaning of the statute" and that "Congress has the constitutional authority under Article III to grant federal courts jurisdiction to create a federal common law of torts for aliens. . . ." *Id.* (footnote omitted). While the court ultimately held that section 1350 was not available because the conduct complained of did not violate the law of nations, its analysis of the statute—making no mention of the need to prove the existence of a private right of action outside the statute itself—plainly conflicts with that set forth by Judge Bork. *See also Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (court suggested that "the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations,' " while not making any reference to a requirement that plaintiffs identify a separate cause of action); *Valanga v. Metropolitan Life Insurance Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966) ("Once a tort can be considered to be in violation of the law of nations, § 1350 allows immediate access to a federal court").

Judge Edwards also contradicted the Second Circuit in holding that the actions of the PLO, which he classified as a non-state actor, are not subject to the dictates of international law and thus not within the purview of section 1350. The PLO in this case stands in the same relation to Libya as the defendant in *Filartiga* did to Paraguay. Here, as in *Filartiga*, the perpetrator is alleged to have acted as an agent of a sovereign state. Indeed, the state nexus is even stronger here than in *Filartiga*, since the terrorists were acting in accordance with Libyan authority, rather than, as Judge Bork describes the Paraguayan official in *Filartiga*, "in violation of the constitution and law of . . . [the] state" and in a manner " 'wholly unratified by that nation's government.' " App. A at 97a (Bork, J., concurring), quoting *Filartiga*, 630 F.2d at 889. Judge Edwards' holding also ignores petitioners' clear and elaborate allegations that Libya sponsored the terrorist attack and that the PLO acted as Libya's agent and under color of its authority. *See* Complaint at 19, ¶ 59. Given these allegations, Judge Edwards' own rationale compels a finding that the District Court *did* have jurisdiction over the PLO. As Judge Bork explained:

> It can be argued that appellants have alleged 'official' torture: the complaint alleges that the PLO, in carrying out its attack . . . was acting at the behest of and in conjunction with Libya. Viewed this way, this case is indistinguishable from *Filartiga*, and as such, Judge Edwards' approach would force us to hear it.

App. A at 101a (Bork, J., concurring).[9]

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[9] Judge Edwards' assumption that Libya enjoys immunity from this suit, App. A at 4a-5a n.1 (Edwards, J., concurring), can neither explain nor rectify his apparent oversight. First, Libya, the only party with standing to raise the Foreign Sovereign Immunities Act as a defense, has never filed an answer to the Complaint; the issue, therefore, has never been briefed or argued bfore the District Court or the Court of Appeals. Furthermore, Libya cannot invoke immunity in this case because its acts are prohibited by

B. Limiting the Prohibitions of the Law of Nations to Acts Unanimously Condemned by all Nation-States Denies Redress to Victims of Acts Prohibited by the Community of Nations, Renders the Law of Nations Meaningless as a Mechanism for Governing the Conduct of Nation-States and Eradicates Customary International Law from United States Law

Judges Bork and Edwards agreed that the barbaric acts of terrorism, torture, hostage-taking and summary execution committed by Libya and its PLO agents do not violate the law of nations. They reached this startling conclusion because they found that at least one nation-state failed to condemn these kinds of acts. In their view, the law of nations prohibits only those acts which are condemned unanimously by all nation-states.

Demanding unanimity of international opinion before acts are deemed to be in violation of the law of nations, however, means that no state-sponsored violation of international law could ever be found. There will always be at least one nation, the sponsor, whose approval of these kinds of acts prevents a finding that they violate international law.[10] This leaves the victim of acts con-

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the doctrine of *hostis humani generis*. With regard to its actions in this case, it is an "enemy of all mankind" whose actions are subject to universal condemnation and adjudication and as such are not protected by the cloak of immunity. Even if the Foreign Sovereign Immunities Act did bar suit against Libya, this case must proceed against the PLO, which is alleged to have acted as that state's agent. Indeed, just as a plaintiff sues an individual to redress official wrongdoing when barred from suing an American state by the Eleventh Amendment, *see Ex Parte Young*, 209 U.S. 123 (1908), so may petitioners sue the PLO herein. In either case, all that is required is that the defendant acted "under color of" state authority.

[10] Perhaps the best illustration of the defects characterizing this analysis was provided by Judge Bork himself. He referred to remarks by a Syrian representative as evidence of the lack of consensus concerning "PLO-sponsored attacks on Israel." App. A at 71a (Bork, J., concurring). Syria itself, of course, is known to approve of and sponsor attacks against Israel. In effect, Judge

demned by the world community without any right of redress. Such an outcome is indefensible, for surely the opposition of one or a few states should not be allowed to repudiate the basic tenets of law that would otherwise protect the victims of such acts. *See* Blum and Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. Int'l L.J. 52, 81 (1981).

Taken to its logical conclusion, the court's requirement of unanimity of international opinion renders international law without force and effect and thus useless as a mechanism for governing the conduct of, and establishing the standards for relationships between, nations. Furthermore, under this theory, customary international law will no longer be incorporated into American jurisprudence as a basis for decision-making since no violation of that law can ever be demonstrated in disputes involving a defendant state or its agents. This proposition is contrary to the express holding of this Court in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

Construing the law of nations to require unanimity also runs afoul of well-settled principles concerning the content of international law. As stated by this Court in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the *general* usage and practice of nations; or by judicial decisions recognizing and enforcing that law." (emphasis added). *See also Filartiga*, 630 F.2d at 880. Far from demanding unanimity, international law

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Bork stated that since Syria chooses to support terrorist raids, the torture, hostage-taking and summary execution those raids raids comprise cannot violate international law.

looks only to the "general assent of civilized nations." *The Paquete Habana*, 175 U.S. at 694; *Filartiga*, 630 F.2d at 881.

Civilized nations clearly agree that terrorism, torture, hostage-taking and summary execution are prohibited by international law. For example, with respect to terrorism, the Assembly of the League of Nations, in its Convention for the Prevention and Punishment of Terrorism, "reaffirm[ed] the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape. . . ." 7 Hudson, International Legislation, 862 L. of N. Off. J., Jan. 1938, 23, App. D at 152a. The Organization of American States, in its Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, O.A.S. Document CP/doc. 54/70 rev. 1 (1970), *reprinted in* 9 Int'l Legal Materials 1117 (1970), App. D at 155a, emphasized that terrorist acts constitute "flagrant violation[s] of the most elemental principles of the security of the individual and community as well as offenses against the freedom and dignity of the individual. . . ." Importantly, the Statement of Reasons for this Draft Convention states:

> Terrorist acts *always* have been the target of public condemnation because of their utter inhumanity and irrationality. . . . [T]errorism is a crime of international law, *unanimously condemned*, even though it may pursue a political or social aim.

O.A.S. Document CP/doc. 54/70 rev. 1 (1970), *reprinted in* 9 Int'l Legal Materials 1250, 1259 (1970) (emphasis added), App. D at 158a.[11]

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[11] *See also* Council of Europe Committee of Ministers Resolution 74(3) on Int'l Terrorism, 1974 Eur. Y.B. 387 (Council of Europe), *reprinted in* 13 Int'l Legal Materials 471 (1974), App. D at 160a (member nations urged to prosecute terrorists when their acts "create a collective danger to human life, liberty or safety; when they affect innocent persons foreign to the motives behind them;

These international accords and agreements plainly indicate that terrorism constitutes a violation of international law. As stated by one commentator:

> [A]lthough there is a lack of consensus on the definition of terrorism, there is a uniformity of purpose in seeking to prevent and punish acts of terrorism. This is an implicit recognition that terrorism is a violation of law, because there must be illegality for punishment to be imposed. In addition, the general statements of human rights conventions demonstrate international consensus that torture and cruel and inhuman treatment, components of terrorist acts, are violations of international law. Thus, sufficient international consensus has been demonstrated for terrorism to be deemed a violation of the law of nations.

Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. 236, 247 (1982) (footnote omitted).

The acts of terrorism at issue in this case include independent acts of torture, hostage-taking and summary execution. Certainly, these acts, inflicted upon civilians, violate the law of nations. The authorities cited by the Second Circuit in *Filartiga*, for example, plainly demonstrate that torture violates the law of nations. 630 F.2d at 881-84.[12] The International Convention Against the

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when cruel or vicious means are used in the commission of those acts"); European Convention on the Suppression of Terrorism, Eur. T.S. No. 90, 15 Int'l Legal Materials 1972 (1976), U.K.T.S. No. 93 (1978), App. D at 161a (urging punishment of those engaged in "an offense involving kidnapping, the taking of a hostage or serious unlawful detention"); Restatement of the Law of Foreign Relations (Revised) § 702 (Tent. Draft No. 3, 1982) (enumerates as violations of international law state-practiced, -encouraged or -condoned "murder" and "torture or other cruel, inhuman or degrading treatment or punishment").

[12] In their *amicus* brief in *Filartiga*, the Departments of Justice and State reviewed an extensive number of international treaties and accords, all of which confirmed the international proscription of torture. *See* Brief for the United States, App. C at 141a-146a.

Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) 245, *reprinted in* 18 Int'l Legal Materials 1457 (1979), App. D at 163a, moreover, states that "the taking of hostages is an offense of grave concern to the international community," and that it is necessary to engage in the "prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism." *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, App. D at 166a (summary executions defined as "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples").

The refusal of the District of Columbia Circuit to recognize that terrorism, torture, hostage-taking and summary execution violate the law of nations conflicts with *Filartiga*. There, the Second Circuit specifically ruled that torture is prohibited by the law of nations within the meaning of section 1350. This prohibition, according to the court, is "clear and unambiguous." 630 F.2d at 884. The Second Circuit emphasized that numerous international agreements condemn the use of torture and that torture is renunciated throughout the world.

In reaching its decision in *Filartiga*, the Second Circuit stated that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881. In stark contrast, Judge Bork apparently held that the law of nations should be confined to the three principal offenses recognized by Blackstone three centuries ago: piracy, violation of safe conducts and infringement of the rights of ambassadors. The Second Circuit relied in *Filartiga* on this Court's holding that the law of nations is not stagnant, but evolves over time:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of *what the law really is.*

The Paquete Habana, 175 U.S. at 700 (emphasis added).

II. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER REDRESS FOR STATE-SPONSORED ACTS OF TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION IS TO BE DENIED BECAUSE OF THE POLITICAL QUESTION DOCTRINE

Judge Robb relied exclusively on the "political question" doctrine to preclude adjudication of petitioners' claims of terrorism, torture, hostage-taking and summary execution. Judge Bork also advanced the political question doctrine, as well as other related considerations of justiciability, as an underlying theme of his opinion. Their opinions conflict with prior decisions of this Court and with the analysis of the Second Circuit in *Filartiga*. Review by this Court is necessary to resolve this conflict and to determine whether a suit seeking damages under sections 1331 and 1350 for acts of terrorism, torture, hostage-taking and summary execution is necessarily nonjusticiable because of the political question doctrine.

The invocation and use of the political question doctrine by Judges Robb and Bork is contrary to this Court's modern formulation of that doctrine in *Barker v. Carr*, 369 U.S. 186 (1962), where Justice Brennan wrote:

> Prominent on the surface of any case held to involve a political question is found a textually demon-

> strable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court cautioned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Justice Brennan subsequently emphasized the narrowness of the political question doctrine with respect to foreign policy matters in *Goldwater v. Carter*, 444 U.S. 996 (1979), stating: "Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'" *Id.* at 1006 (Brennan, J., dissenting), quoting *Baker*, 369 U.S. at 211-13.

The issues raised by petitioners' allegations of terrorism, torture, hostage-taking and summary execution are not among those made nonjusticiable by the political question doctrine. Whether there exists a "general assent among civilized nations" that such acts are prohibited, for example, is not a question that has been constitutionally committed to a coordinate branch of government; rather, it is a question that, calling for an analysis of the content and applicability of the law of nations, is undeniably within the proper scope of judicial review. Furthermore, whether section 1350 provides its own right to sue is a question of statutory construc-

tion, clearly susceptible of judicial handling. The enactment of section 1350, in fact, plainly evidences a congressional intent to channel into the federal courts lawsuits such as this that implicate actual or potential violations of the law of nations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *Ex Parte Quirin*, 317 U.S. 1, 27-30 and n.6 (1942). Finally, whether petitioners are entitled to the relief requested depends upon factual determinations that the alleged wrongful death and severe injuries occurred, and that the acts of Libya and its sponsored and financed terrorists caused those events. Certainly, the federal courts are capable of making such determinations.

The other concerns identified in *Baker* are equally inapplicable to the case at bar. The Court does not, for example, lack "judicially discoverable and manageable standards." *Baker*, 369 U.S. at 217. In *The Paquete Habana*, 175 U.S. at 700, this Court discussed the means of discovering the content of and applying the law of nations, and the principles set forth there should be applied with equal force herein. Moreover, as Judge Robb himself recognized, "[t]here has been no executive recognition" of the PLO, App. A at 107a (Robb, J., concurring), nor any specific governmental action or decision taken regarding the terrorist acts at issue herein. Accordingly, there have been no "political decision[s] already made" to which there exists "an unusual need for unquestioning adherence." *Baker*, 369 U.S. at 217.

Judge Robb's exclusive reliance upon both the political question doctrine and the theory that federal courts should not entertain cases such as this, involving allegations of terrorism, torture, hostage-taking and summary execution, conflicts not only with *Baker v. Carr* but also with *Filartiga*. That case, like this one, involved allegations of torture; there, as here, foreign policy considerations were implicated; that suit, like the one brought by petitioners, challenged the actions of a sovereign's agent. Nevertheless, the Second Circuit, unlike Judges Robb and

Bork, did not hold or even suggest that adjudication was precluded on the basis of the political question doctrine or the political nature of the case. Indeed, in *Filartiga*, the Second Circuit specifically requested the Departments of State and Justice to provide an opinion of the "proper interpretation of 28 U.S.C. § 1350 in light of the facts of this case," Brief for the United States, App. C. at 132a, thereby affording the government the opportunity to comment on the applicability of the political question doctrine or other general considerations of justiciability. In contrast, Judges Robb and Bork, without any statement from the State Department or any other evidence to support preclusion, seemingly presumed that the Department of State had acted in this case in such a manner that prevents its adjudication. Judge Robb, in particular, then made this assumption dispositive of the issues presented. The error associated with such action is no better illustrated than by an examination of the government's Brief in *Filartiga*, where, concluding that plaintiffs' claims were properly before the court, it stated: "Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government." Brief for the United States, App. C at 148a.

The use of the political question doctrine by Judges Robb and Bork is premised upon an inaccurate characterization of petitioners' claims. Petitioners in this case do not, as Judges Robb and Bork have apparently presumed, seek adjudication of the status of the PLO, the relationship between Israel and the PLO or the relationship generally between the United States and the Middle East. Rather, a far narrower issue is presented: whether petitioners are entitled to a damage award under section 1331 and 1350 as a result of the terrorism, torture, hostage-taking and summary execution allegedly inflicted by Libya and its terrorist agents.

Of course, because this case involves acts that were perpetrated in the Middle East and because the United

States' activities in that region are the subject of national interest, the issues are presented in a more politically-charged context. As this Court emphasized in *Baker*, however, "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217. Indeed, the presence of issues "with significant political overtones does not automatically invoke the political question doctrine." *INS v. Chadha*, —— U.S. ——, 103 S. Ct. 2764, 2780 (1983). The Court's duty in this case, as Chief Justice Marshall declared in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), is undeniable: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

III. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER PETITIONERS WHO ARE UNITED STATES CITIZENS ARE TO BE DENIED REDRESS UNDER 28 U.S.C. § 1331 FOR INJURIES SUFFERED AS A RESULT OF STATE-SPONSORED ACTS OF TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION

The Tel-Oren petitioners, citizens of the United States, were held below to have failed to establish jurisdiction under section 1331 because the treaties of the United States do not give rise to a cause of action for the injuries they sustained. This holding conflicts with prior decisions of this Court and the Ninth Circuit. Review is thus necessary to resolve this conflict and to determine whether the petitioners who are United States citizens have causes of action "arising under . . . treaties of the United States" within the meaning of section 1331.

The ratification of a treaty by the United States makes it the law of the United States. *See, e.g., Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). In *Head Money Cases*, 112 U.S. 580, 598-99 (1884), this Court structured the test for determining when ratified treaties confer private rights on United States citizens:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

The lower court's holding that the Tel-Orens did not establish jurisdiction under section 1331 conflicts with this ruling, since under the standard set forth in *Head Money Cases* the Tel-Orens clearly have causes of action arising under treaties of the United States. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, App. D at 165a-166a, for example, satisfies the standard set forth in *Head Money Cases*.[13] Its essential purpose is directed to protecting the rights of persons who are civilians. It confers individual rights on such persons, and states in detail that these individuals are to be free from acts of torture, terror, hostage-taking and genocide. The rights given to individuals are clear, unmistakable and enforceable in United States courts, without the enactment of any new legislation, pursuant to the "arising under" clause of section 1331.[14]

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[13] Other treaties satisfying this standard are Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993; Convention with Respect to the Law and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; and Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135.

The failure to recognize that the American citizens have causes of action arising under treaties of the United States also conflicts with the decision of the Ninth Circuit in *People of Saipan v. United States Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). There, plaintiffs alleged that they had a private right of action based on a Trusteeship Agreement pursuant to which the United States was authorized to administer the territory of Micronesia. The Ninth Circuit held that plaintiffs did indeed have a private right of action, stating:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self execution.

Id. at 97. For the reasons stated above, the Geneva Convention and the other cited treaties confer on petitioners a private cause of action pursuant to this test established by the Ninth Circuit.

CONCLUSION

This case presents the profoundly important question of whether the federal judiciary will construe sections 1331 and 1350 to provide redress for barbaric acts condemned by the civilized world. The decision below eradicates a right of redress granted to the victims of such acts, a right of redress incorporated into our law by the First Judiciary Act two hundred years ago. This case

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[14] Judge Bork errs when he suggests that *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978), held that the first Geneva Convention is not self-executing. That decision addressed only portions of the Convention not at issue here.

also presents the compelling question of whether international law will retain its traditional role as an important part of American jurisprudence.

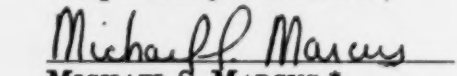
Two of the judges below have recognized the significance of these questions and the need for review by this Court. As explained by Judge Bork, "[t]he meaning and application of section 1350 will have to await clarification elsewhere. Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed." App. A at 104a (Bork, J., concurring). Judge Edwards is even more explicit:

> This case deals with an area of the law that *cries out for clarification by the Supreme Court.* We confront at every turn broad and novel questions about the definition and application of the 'law of nations.' . . . [T]he central controversy of this action has now produced divided opinions between and within the circuits.

App. A at 4a (Edwards, J., concurring) (emphasis added).

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the District of Columbia Circuit.

Respectfully submitted,



MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN
& MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

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